Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

KENNETH TALMON,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST & SOUHTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether it is a violation of due process to determine ERISA denial of benefits claims under the arbitrary and capricious standard of review rather than de novo.

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Opinions Below

The ruling of the United States Court of Appeals for the Sixth Circuit dated May 14, 2007 affirming the decision of the District Court was not recommended for full-text publication and is reproduced at App. A at 1a.

The order of the United States District Court of the Northern District of Ohio dismissing the Petitioner's complaint dated January 6, 2007 is reproduced at App. B and C at 6a, 21a.

Jurisdiction

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on May 14, 2007. This petition is timely filed under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

Statutory Provisions Involved

The relevant statutory provision is ERISA § 502(a), 29 U.S.C. § 1132.

Statement of Case

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (federal question). The Petitioner brought claims for breach of fiduciary duty and denial of benefits under Section 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132. The district court

dismissed Petitioner's complaint and granted Respondent's Motion of Judgment on the Administrative Records as to all claims.

A. Summary of the Allegations in the Complaint

The Petitioner, Kenneth Talmon, began employment on or about 1969 with Southern Express a participating employer in the Central States Southeast and Southwest Areas Pension Fund. Petitioner worked without any break in service from 1969 to 1986 which qualified him to receive certain benefits under the pension plan.

The Petitioner was a combination driver in Cleveland, Ohio. Pursuant to the national master agreement he was able to follow his job based upon seniority. Petitioner has argued for several years that Illinois California Express (hereinafter "ICX") did not shut down its operations in Ohio in 1980. This is substantiated by Bobby Shank, a fellow driver. This is also substantiated in Kevin McDonald's memorandum. ICX, in Kansas, hired drivers off the street, in violation of Petitioner's seniority. This was substantiated by the Affidavit of Tom Koeger The Affidavit of Ken Criss substantiated that Petitioner worked for Pacific Intermountain Express Company (hereinafter "P.I.E.") in 1969. Teamsters Local Union No. 293 has claimed that Petitioner had a break in service in 1968 which is false. The incorrect perceptions of Local Union No. 293 and Local Union No. 407 has resulted in Petitioner not receiving his full pension rights.

Frank Burdell, President of Local Union No. 407, investigated Petitioner's claims and concluded based upon the evidence that Petitioner did not have a break in service. Mr. Burdell further concluded that Petitioner was entitled to credit for additional years because he was not allowed to follow his

job ar hat ICX never correctly processed a Change of Operations in Ohio. ICX continued operations in Ohio until 1985. Petitioner was essentially deprived of the right to work from 1980 to 1985 at ICX. Petitioner was injured in 1990 and never worked thereafter. Moreover, Petitioner's Social Security records demonstrate that from January to March 1968 Petitioner contributed $1,696.55; from April to June he contributed $2,387.29; from July to September he contributed $1,658.67; and from October/November he contributed $929.52 from his combined work assignments at American Vineyards Company, Inc., and United Vintners, Inc. In addition, Petitioner worked at Watkins Furniture Company in December 1968.

Petitioner's service has also been miscalculated for 1969. Petitioner worked 28 weeks for Southern Express, which became ICX and worked for Lee Way Motor Freight, Inc., in August/September 1969. In 1969 Petitioner also worked for Admiral Merchants Motor Freight, Inc.; P.I.E.; Michigan Express; May Company; Wilson Motor Freight; Snyder Motor Freight; Truck Rail, Inc.; U.M.H. Steiner, Inc.; and R.H. Eckenroth Sales Company, which were required to make contributions to Local Union No. 407. All of the foregoing was submitted to Respondent by Petitioner to no avail. The Respondent's decision to deny Petitioner the additional credit was without any basis in the administrative record. Petitioner was done a severe injustice and should be given additional credit toward his full pension of approximately $2,500.00 per month. Respondent Central States refused to pay Petitioner his proper benefits under the pension plan alleging that there was a break in Petitioner's service which disqualifies him from receiving his full benefits under the pension plan. On or about 1980 Petitioner was laid off from employment by Illinois California Express, also

known as ICX. That Petitioner suffered and continues to suffer financial loss as a result of Respondent's actions.

B. The Decisions Below

The District Court dismissed the complaint holding that ERISA bars fiduciary duty claims on behalf of a participant suing for individual benefits, and on the administrative record, Central States' denial of benefits was not arbitrary and capricious.

The Court of Appeals affirmed the Judgement of the District Court. The Court stated in its decision that the district court correctly applied the arbitrary and capricious standard of review and that the Petitioner was ineligible for a Partial Pension. The Court of Appeals did not issue a full written opinion.

REASONS FOR GRANTING THE PETITION

This case presents an important issue whether it is a denial of due process to review ERISA denial of benefits under the arbitrary and capricious standard of review. The arbitrary and capricious standard of review deprives an individual of his due process rights regarding the important property interest of pension benefits.

I. THE STANDARD OF REVIEW FOR AN ERISA DENIAL OF BENEFITS CLAIM SHOULD BE DE NOVO WHEN THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW RESULTS IN A DENIAL OF DUE PROCESS.

The standards of review for determining Employee Retirement Income and Security Act denial-of-benefits claims

are well-established. In cases in which a plan administrator is given no discretionary authority by the plan, review of the plan administrator's decision by the district court as well as the court of appeals in de novo, with respect to both the plan administrator's interpretation of the plan and the plan administrator's factual findings. When conducting a de novo review, the district court must take a fresh look at the administrative record but may not consider new evidence or look beyond the record that was before the plan administrator. *Wilkins v. Baptist Healthcare Systems, Inc.*, 150 F. 3d 609 (6th Cir. 1998).

This standard differs form the arbitrary and capricious standard of review that is used when benefits plan gives the plan administrator discretionary authority to determine eligibility for benefits or construe the terms of the plan. *Firestone Tire and Rubber Co. v. Bruch* , 489 U.S. 101, 115 (1989). Prior to the *Firestone* decision, a vast majority or courts reviewed ERISA claims under the deferential arbitrary and capricious standard of review, permitting claims to be resolved "without extensive inquiry into the merits of the dispute and by the liberal use of procedural devices such as summary judgment." James L. Nolan, *Defending the Insurance Company Against Claims for Wrongful Denial in Administration of Employee Benefits Plans*, C877 ALI-ABA 193, 223 (1994). A de novo review of the administrative record would have allowed Petitioner to provide important relevant evidence to the court indicating that he did not suffer a break in service and therefore was entitled to receive his full pension benefits.

The District Court's application of the arbitrary and capricious standard of review of Petitioner's claims violated Petitioner's due process rights. The Due Process Clause of the Fourteenth Amendment provides: Nor shall any state deprive

any person of life, liberty, or property, without due process of law. Historically, this guarantee of due process had been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. The Due Process Clause was intended to secure the individual from the arbitrary exercise of the powers of government. By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures use to implement them, *e.g.*, it serves to prevent government power from being used for the purpose of oppression.

The Due Process Clause of the Fourteenth Amendment has historically been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property, reflecting the traditional and common-sense notion that it is intended to secure the individual from the arbitrary exercise of the powers of government.

The lower Courts' erroneous decisions deprived Petitioner of his ERISA benefits, an important property interest. This deprivation has a had a serious impact on Petitioner's quality of life during a time that he should be financially secure according to the terms of the Collective Bargaining Agreement that governed his employment as a truck driver and a member of the Teamsters Union.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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